No. 08-296

Supreme Court, U.S.
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IN THE

United States Supreme Court

KAREEM W. (ANONYMOUS),

Petitioner,

v.

MR. AND MRS. ANONYMOUS, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the New York State Court of Appeals

REPLY FOR PETITIONER

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I. The Brief in Opposition Ignores the Findings of Fact in the Decision by the Family Court Chief Administrative Judge Who was the Trier of Fact Below and Whose Decision Was Affirmed 3-to-1 by the Appellate Division; Instead, it Seeks to Substitute its Own Gleanings from the Hearing Transcripts (Offered without Citation to Contrary Testimony from those Transcripts) for those Judicial Findings of Fact.

The Brief in Opposition has been filed jointly by three of the four respondents. The other respondent, the Law Guardian for Seasia D., did not join in the Brief in Opposition. The focus of the brief is upon the three respondents' allegations of the Petitioner's failures to act. However, in that brief there are almost no citations to then Queens Family Court Chief Administrative Judge DePhillips' decision for the factual record in this case, even though that extensive factual record as laid out in Judge DePhillips' decision was affirmed 3 to 1 by the Appellate Division and not controverted as to the facts themselves by the Court of Appeals in its very brief memorandum. Judge DePhillips' findings are entitled to the deference given to findings of fact made by the trier of fact in any proceedings under the high standards required for overturning them, and these findings of fact were never overturned in the proceedings below.

However, instead of deferring to those findings, the Brief in Opposition seeks to substitute its own contentions and gleanings from the hearing tran-

scripts (offered without citation to contrary testimony from those transcripts) for the judicial findings of fact in this case in an attempt to "end-run" those many detailed findings of fact by the trial judge that the Brief in Opposition clearly finds unpalatable. This pattern throughout the factual recitation contained in the Brief in Opposition is illustrated here with respect to the following principal assertions made in it:

1. The Brief in Opposition asserts that the private adoption agency, Respondent Family Focus Adoption Services, Inc. ("FFAS"), failed to contact the birth father because "The birth mother told FFAS that she didn't know who the birth father was." Opp. at 2, citing the Court Transcript of 6/6/06 at 16. The Brief in Opposition also asserts that "FFAS was unable to ascertain the identity of Seasia's birth father." Opp. at 2, apparently citing the Court Transcript of 3/24/06 at 15-18. However, Judge DePhillips found that Respondent FFAS could readily have ascertained this information from the birth mother and her family had it but asked (even assuming that in fact it didn't ask or find out, as it asserts) and pressed the birth mother's family, who clearly sought in every way possible to prevent the Petitioner—whom they knew to be the father—from having any contact with or asserting any interest in his daughter. Referring to an interview by the director of FFAS of the birth mother and her adult sister, Judge DePhillips found that "The dialogue was permeated with a 'don't ask, don't tell' approach under circumstances

which warranted a reasoned and searching inquiry." App. 46a. It is clear that Respondent FFAS never even asked the obvious question of the birth mother or her family, "Has anyone claiming to be the birth father ever attempted to contact you?" An honest answer to that question would have told them as much and more than any registry could. In fact, FFAS apparently had a general agenda to get baby Seasia for adoption through its agency (by whom the child was placed with Respondents Mr. and Mrs. Anonymous in foster care with a view to adoption) without regard to observing inconvenient legal niceties. As Judge DePhillips found,

> "On April 1, 2004, the subject child Seasia was born. On April 3, 2004, Tenisha signed an extrajudicial surrender of her child to Family Focus without benefit of legal counsel. The record clearly shows that no counseling services were provided the infant mother by the adoption agency with respect to this child's knowingly and voluntarily consenting to the adoption. . . ." App. 45a.

Family Court found, and the Appellate Division affirmed, that the extrajudicial surrender by the birth mother orchestrated by Respondent FFAS was invalid both because she was acting under duress from the maternal grandmother and because "she did not have independent counsel. . . ." App. 15a.

2. The Brief in Opposition states that, contrary to the duty of a consent father as asserted in the brief, "FFAS received no money from Respondent [sic] for the birth mother's prenatal care, for hospital or doctor's bill in connection with Seasia's birth." Opp. at 2, citing the Court Transcript of 6/1/06 at 112. However, the Appellate Division's affirmance of Judge DePhilips' decision dealt easily with this claim: "Since the birth mother's medical expenses were paid by Medicaid, the biological father's failure to contribute to those expenses is thus not determinative." App. 13a (citation omitted). Moreover, Judge DePhillips found that the Petitioner's offers of other payments and support were rejected and that Petitioner was threatened by the birth mother and her family with prosecution for rape, as discussed further under entry 3 *infra*, if he so much as tried to see the birth mother or have any contact with her—an act of blackmailing which nonetheless did not deter Petitioner. Petitioner and his family made repeated calls to the birth mother and her family yet were completely rebuffed. In short, as the findings of the trier of fact indicate unequivocally, Petitioner did everything in his power, including trying to give of his limited resources at the time as a 16-year-old minor child, and of his family's resources as well—efforts that were spurned—to live up to the spirit as well as the letter of this Court's decisions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), *Lehr v. Robinson*, 463 U.S. 248 (1983), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Quillion v. Walcott*, 434 U.S. 246 (1978), and *Stanley v. Illinois*, 405 U.S. 645 (1972) and of

the New York State Court of Appeals' decision in *Matter of Raquel Marie X.*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855 (1990), *cert. denied sub nom. Robert C. v. Miguel T.*, 498 U.S. 984 (1990). Yet all of Petitioner's efforts were in vain because the birth mother and her family frustrated his efforts at every turn and the agency did nothing to ameliorate the situation but instead only worsened it by looking the other way, as the trier of fact found, evidently to serve its own purposes. As the Appellate Division stated, "the evidence at the hearing established that, during the relevant six-month period, the biological father publicly acknowledged paternity and exhibited a willingness to assume full parental responsibilities. However, those efforts were rebuffed by the birth mother's family." App. 8a. The Appellate Division also commented on "the efforts of the birth mother's family to keep her plans a secret" including not informing Petitioner "of the birth mother's plans or the child's birth until after the child was surrendered for adoption." App. 13a. As Judge DePhillips found,

> "Kareem W. has manifestly demonstrated his willingness to assume full custody of the child and has done so promptly under circumstances where there has been a concerted endeavor to frustrate his efforts and to intimidate him in his endeavor to avail himself of the opportunity to demonstrate that he is willing and able to enter into the fullest possible relationship with his child. It is beyond cavil that his persistent

> efforts commencing in November of 2003 when he was informed that Tenisha was pregnant were manifested prior to the child being born, prior to the birth mother's execution of the surrender, prior to the child being placed with the petitioners and prior to the filing of the adoption petition." App. 61a.

3. The Brief in Opposition asserts that the birth mother claimed rape and so told the police and the District Attorney's Office. Opp. at 3, citing Court Transcripts of 5/31/06 at 48, 75 and of 6/1/06 at 105. However, Judge DePhillips determined the following:

> "The court finds that the legal father of the child Seasia stands before this court never having been arrested for, charged with or convicted of rape. The court finds that at all relevant times in connection with this litigation, the birth parents of the subject child are themselves infants, that is un-emancipated minors. Credible testimony discloses that the birth mother Tenisha D. became pregnant in consequence of a single act of intimacy between the birth parents at the church which they and their respective families attended in Staten Island. At the time of this act, Tenisha was thirteen years of age and Kareem W. was sixteen years of age. The incident occurred. . . under circumstances where these two children together with other children were aiding the adult parishioners who ran and are volunteers at the church pantry. . . ." App. 39a-40a.

The court also found that adult supervisors were in the area, including Kareem's mother, the adult sister of Tenisha, and the church pastor's wife. *Id.* at 40a. The court went on to find, "There is no outcry or any disclosure by Tenisha of this event for some five months." *Id.* The Family Court decision also refers to a "theme of possible promiscuity on the birth mother's part" (*Id.* 43a) and even notes that "the birth mother's own law guardian Deana Balahtsis"—who also subsequently acted as counsel for the family seeking to adopt Seasia (*Id.* 65a) —acknowledged that the birth mother "had sex with other males" besides the Petitioner. *Id.* 43a. Moreover, Judge DePhillips also found that,

> "The record clearly demonstrates a course of action on the part of Kareem W. and his mother Karen S. to maintain contact with the birth mother subsequent to the November 2003 meeting of the two families and the calculated endeavor on the part of Tenisha's adoptive mother...to frustrate that endeavor and even to intimidate the infant birth father and his family with the accusation of statutory rape." App. 46a.

The Appellate Division confirmed that, as a matter of law, the conduct at issue here "could not be classified as statutory rape." App. 9a. It also noted that, as testified by Petitioner, part of the purpose of his November 2003 meeting with the birth mother's family was "because 'I wanted to see her; she was pregnant.' " *Id.* The element of blackmail in the threats of rape charges can be seen in the

late making of those charges to authorities by the birth mother and her family months after the single event of intercourse, but it is also the case that the birth mother made multiple inconsistent statements on the subject of rape including her statement that she made the charges "because she feared her parents would punish her" and her statement on another occasion that she had lied about the charges. App. 42a. Clearly, the rape charges were made and timed to discourage Petitioner from filing his paternity and custody petitions in Family Court seeking to uphold his rights as a consent father. App. 39a-43a. However, they did not succeed in deterring Petitioner from making and pursuing those filings.

4. The Brief in Opposition asserts that "Petitioner became aware that the birth mother was pregnant in November of 2003, almost six months before Seasia was born..." but did essentially nothing until right after the birth when he filed his court petitions. Opp. at 3. The brief further specifically asserts that Petitioner failed to act even though "Petitioner's relatives possessed the home phone and cell numbers of the birth mother's aunt" and "the birth mother continued to reside at her residence and attended school regularly." Opp. at 3, citing Court Transcripts of 6/6/06 at 88 and 5/26/06 at 141, respectively. However, the Appellate Division noted that calls were made "every two or three days" to no avail, that the birth mother's family, including her aunt, wouldn't return calls and, as discussed *supra*, that the family threatened

Petitioner with criminal prosecution for rape if he tried to see or contact the birth mother or his daughter. App. 10a. Yet as the Brief in Opposition itself acknowledges, action was taken by Petitioner to assert his paternity and his desire for custody well within the six months that the Brief in Opposition itself describes as the time measurement under New York law for prompt action by a birth father to assert his rights. Opp. at 6. As the Appellate Division stated, "The biological father promptly commenced a paternity proceeding and a custody proceeding less than one month after the child's birth." App. 13a. In fact, the truly unfounded assertion that Petitioner did essentially nothing is contradicted by the record throughout as he sought in vain to get the birth mother and her family to let him have any contact with the birth mother, before or after the birth, and with his child, or to help out in any way. Even under these daunting circumstances, Judge DePhillips found that well before the birth of Seasia,

> "Within his limited capabilities Kareem, independent of the efforts of his mother on his behalf, rode his bike to church in the hopeful expectation that he might see Tenisha—a small but significant act. On or about January 26, 2004, Kareem accompanied by his mother went to church to speak with Pastor K. in his continuing endeavor to be involved and included in his then unborn child's life. With the support of his mother, he advised that he wanted to be at the hospital when the child was born

and wanted to be involved in the naming of the child." App. 46a-47a

Yet Petitioner's efforts were met only with threats that he would be arrested for rape if he persisted in his endeavors to try to see the birth mother or his child or to have any role in their lives, threats that were carried out when Petitioner did in fact persist. *Id.* In the context of these efforts and the birth mother's and her family's threatening responses, the assertion in the Brief in Opposition that "Petitioner did not ask any questions about the birth mother's health or well-being or her pre-natal plans" at the November 2003 meeting (Opp. at 3) can only be considered tragically ironical.

5. The Brief in Opposition refers critically to the move of Petitioner to Maryland from New York City. *Id.* However, the Appellate Division's conclusions about that move based on Judge DePhillips' findings are quoted in full in the Petition (Pet. at 5) and end with the statement by the court that, "The attempts to reach the birth mother's family by telephone continued after the move to Maryland, to no avail." App. 14a. The move of Petitioner's family to Maryland was occasioned by exigent family circumstances unrelated to the matters at issue here, and yet even that did not deter Petitioner's efforts to have a relationship with his daughter as her father.

The short of it is that the birth mother and her family would not permit contact by Petitioner and

sought in every way, including by threats and intimidation, to prevent his contact and to deter him from asserting his fatherhood and acting as a father to his daughter. Yet Petitioner was undeterred by these threats and intimidation and, in the face of the stonewall erected by the birth mother and her family—aided and abetted by the self-interest of Respondent FFAS that caused it to keep its blinders on—sought vindication of his rights in the courts immediately after his daughter's birth when it was clear that no other way was possible in light of the forces assembled against him. Petitioner, even though a minor, did so in exactly the ways prescribed in this Court's decisions and in the Court of Appeals' decision in *Raquel Marie X.*

II. The Family Court's Findings of Fact, Affirmed by the Appellate Division, Lay Out Starkly and in Detail the Lack of Equal Protection and Due Process Accorded Petitioner That Has Adversely Affected Both Him and His Daughter Seasia.

Throughout the Brief in Opposition, the findings of fact made by the trial judge hearing the case in Family Court as summarized in the Petition (Pet. at 3–7) have been ignored to try to justify a result more palatable to those parties filing the brief. The reality is that the Family Court's findings of fact, to which deference should be accorded, lay out starkly and in detail the lack of equal protection and due process accorded Petitioner that has adversely affected both him and his daughter Seasia.

It is, therefore, no wonder that the Brief in Opposition seeks so assiduously to avoid those findings of fact. Yet, ironically, the brief also implicitly acknowledges the significance of those findings of fact as applied to the jurisprudence of this Court when it says of the New York State law at issue here, "The law struck down...was unconstitutional because a father could not comply with the law's requirement without the mother's acquiescence." Opp. at 16, citing *Raquel Marie X.*

There, the issue was the statutory requirement of living with the birth mother; here, the issue is birth mother and family rejection, thwarting, and intimidation of Petitioner at every turn in his attempts to help and be a presence in the birth mother's and his daughter's lives. That issue of the thwarting by a birth mother and also, in this case, by her family is the very issue presented by Petitioner's circumstances here (aggravated by the fact that the Petitioner was himself a minor at all relevant times at issue, as was the birth mother), and for that reason among the other reasons cited in the Petition, the Petition should be granted.

CONCLUSION

For these reasons, and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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